

No. 16176 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS FIANO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging the appellant guilty of a one count indictment charging the sale and facilitation of 17 ounces, 150 grains of heroin in violation of Title 21, United States Code, Section 174.

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.

STATUTE INVOLVED.

Unfortunately appellant has misstated Section 174 of Title 21, United States Code. That statute provides in pertinent part as follows:

“Whoever . . . knowingly . . . receives, conceals . . . sells, or in any manner facilitates the transportation, concealment, or sale of any . . . narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.

“Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

III.

STATEMENT OF FACTS.

The events in this case properly begin in the early part of March of 1958 when Federal Narcotics Agent Stephan F. Giorgio, using the assumed name of Louis Di Stephano, entered Lucy's Restaurant in Los Angeles, California with a special employee and was introduced to Fiano by one Jeanne Haddad. [R. 48-49.]* After this meeting the agent returned to the restaurant on a number of occasions during which he became friendly with appellant. Giorgio and the appellant, who was employed at Lucy's, engaged in “general conversations” [R. 49] about

*The abbreviation “R.” refers to the Printed Record.

“the weather in New York” and “the old neighborhood” [R. 90] during the agent’s visit to the restaurant, but they did not discuss anything pertaining to narcotics until March 26 of 1958. [R. 110.] On the last-named date Giorgio arrived at Lucy’s in the early afternoon, had his car parked by the attendant, entered the restaurant, and met the defendant. [R. 50.] The two men sat down at a table in the back of the restaurant and engaged in a general conversation. [R. 51.] Fiano then asked the agent if he was interested in buying a woman’s cocktail watch for his wife. [R. 51, 96-97.] The defendant informed Giorgio that the watch was valued at \$900, but that he was willing to sell it for \$200. To this Giorgio replied that the watch was very nice, but that he wanted to keep his money for his “action.” [R. 51.] After much persistence on the defendant’s part in asking Giorgio what his “action” was, the agent finally told defendant that he was a “pusher.” [R. 52.] An inquiry was made by Fiano as to how much narcotics Giorgio could “push,” and when the agent said “half a kilo a week,” the defendant told him not to bother with it unless he could push at least one kilo per week. [R. 52-53.] The defendant did, however, discuss prices of the commodity with Giorgio, informing the latter that a kilo would cost \$15,000—\$14,000 for Fiano’s “people” and \$1,000 for himself. [R. 53.] The two men haggled over this price for a few minutes before Giorgio left the restaurant with the parting words to Fiano that he would consult “his (Giorgio’s) people” about the price. [R. 54.]

The next day, Giorgio received a telephone call from appellant, who asked Giorgio to come to the restaurant. After arriving at Lucy’s at approximately 3:00 p.m. Giorgio was escorted by Fiano to a table where the latter informed the agent that he was going to check him out before dealing. [R. 56.] The defendant then queried

Giorgio about his background in New York, his acquaintances, and his relationship with the special employee, "Teddy." [R. 56-57.] The conversation again turned to the proposed sale of narcotics when Fiano asked the agent how much money he could raise and when he could raise it. After telling the defendant that he could raise \$7,500 in a few days, Giorgio left the restaurant. [R. 58, 60.]

Agent Giorgio again received a telephone call on March 28 from appellant and shortly thereafter drove to Lucy's to meet Fiano. [R. 61.] After arriving at the restaurant Fiano and Giorgio walked out to the parking lot where the defendant once again queried the agent about his background, his neighborhood, and also asked him if he knew various racketeers in New York. [R. 63.] It was on this occasion that Giorgio gave Fiano the name and telephone number of Bobby Childs so that the defendant could check up on Giorgio. [R. 64-65.] After two unsuccessful attempts by Fiano to reach Childs in New York via telephone, Giorgio left with the defendant's instruction to return that evening. When Giorgio did return at approximately 7:00 p.m., he was observed to enter the restaurant by officers Jackson [R. 144-145] and Jones. [R. 151-152.] During the time he was inside the restaurant both Giorgio and Fiano were seen talking together by Agent Lang to whom Fiano offered some barbecued shrimp. [R. 130.] On this occasion the defenedant again tried unsuccessfully to reach Bobby Childs in New York. [R. 69.] After assuring Fiano that he had the money for the narcotics, Giorgio left the restaurant. [R. 70, 131, 152.]

The next contact Agent Giorgio had with Fiano was on April 2, 1958 when the defendant telephoned Giorgio at approximately 12:30 p.m. The defendant told Giorgio to come to Lucy's later that evening and to bring the money

for the narcotics. [R. 71.] Pursuant to these instructions Giorgio drove to Lucy's [R. 71] and was seen entering the restaurant at 9:00 p.m. by surveilling officers. [R. 119, 145-146.] Once again Agent Lang was stationed inside Lucy's and observed Agent Giorgio enter the restaurant, meet Fiano, and walk out of sight to the rear of the restaurant with the defendant for about ten minutes. [R. 131-132.] During the period of time Fiano and Giorgio were alone together at the back of Lucy's, the defendant told Giorgio that Fiano's people had warned him about Giorgio, but that he had finally spoken to Bobby Childs and that he would do business with Giorgio anyway. [R. 72.] After being threatened by the defendant, Giorgio handed him the sum of \$7,500 for the narcotics. Fiano did not transfer the heroin to Giorgio at that time, however, but told Giorgio to "sit tight" and expect a telephone call within two weeks. [R. 73.] Though Giorgio expressed dissatisfaction at this arrangement he finally left the restaurant to await further communications from Fiano. [R. 74.]

The expected telephone call from Fiano came on the morning of April 7, 1958. Fiano told Giorgio to come to the restaurant because he wanted to introduce him to someone. [R. 74.] Giorgio immediately drove to Lucy's and for the first time in all his visits to the restaurant parked his car himself. Since he was in a hurry he parked the car in a rather odd angle across the white parking lines in Lucy's lot. [R. 75-76.] At this time—approximately 10:30 a.m.—Giorgio was seen by surveilling officers to enter the parking lot at Lucy's. [R. 119, 147, 153.] The agent was greeted by the defendant, who was standing near the kitchen door, and then the two men entered the restaurant where they sat down at a table and again discussed the proposed transaction. Fiano told Giorgio that

“his (Fiano’s) people” were going to take the agent’s car and that the heroin would “be under the front seat on the driver’s side.” [R. 78.] Fiano then left the agent’s presence for about fifteen minutes. During this absence from Giorgio, Fiano was observed by Agent Jones to come out of the restaurant into the parking lot and to approach the direction of Giorgio’s car, which was parked behind a wall which obstructed Jones’ view. [R. 154, 163.] Fiano was lost from view for about two minutes, after which time he reappeared and carefully scanned the entire area. [R. 154.] Fiano then re-joined Giorgio in the restaurant and asked the agent what he used to “cut” narcotics. [R. 78-79.] After discussing this for a few minutes, the defendant told Giorgio that his car had been returned and that the narcotics were under the front seat on the driver’s side. [R. 79.] Both the defendant and Giorgio walked into the parking lot where the agent noticed that his car was parked in the same position in which he had parked it. [R. 80.]* He entered the vehicle and drove off, leaving the defendant who was observed by other agents to carefully look up and down the street before reentering the restaurant. [R. 80, 154-156.] When Giorgio reached his apartment he found the narcotics under the front seat of his automobile on the driver’s side and carried the package into his apartment. [R. 81.] Agent Garberson arrived shortly thereafter and conducted a field test which indicated the package contained heroin. [R. 83.] A more thorough analysis by a chemist at a later date established that package contained approximately 17 ounces of pure heroin. [R. 44-45.]

*Surveilling officers testified that the automobile was not observed to have left the lot between the times Giorgio arrived and departed on April 7. [R. 147, 163.]

Agent Giorgio's next meeting with Fiano was at Lucy's Restaurant on May 12, 1958 at which time and place Fiano informed Giorgio that he was leaving town. [R. 84-85.]

After his arrest on May 14, Fiano identified Giorgio as Lou Di Stephano, one of his customers at Lucy's, when the latter confronted him at the Office of the Bureau of Narcotics. [R. 86.] Prior to his admission regarding Giorgio, Fiano had been fully advised of his constitutional rights by other agents. [R. 134-135.]

IV.

ARGUMENT.

A. The Alleged Error in Disqualifying Witnesses Blackburn and Fiano as Proponents of Certain Hotel Records.

The initial weakness in appellant's argument that the disqualification of John Blackburn and the defendant as proper custodians of hotel records constituted reversible error, is that the facts supposedly contained in such records were placed before the jury by the admission of other evidence of the same facts. In such cases, if there is error in exclusion of certain evidence, it is uniformly held that such errors are cured by admission of other evidence of the same facts.

Barshop v. United States, 192 F. 2d 699, 701 (5th Cir., 1951), cert. den. 342 U. S. 920;

Finn v. United States, 219 F. 2d 894, 901 (9th Cir., 1955);

Furlong v. United States, 10 F. 2d 492, 494 (8th Cir., 1926);

De Camp v. United States, 10 F. 2d 984, 985 (D. C. Cir., 1926);

Strada v. United States, 281 F. 2d 143 (9th Cir., 1922).

In the instant case, testimony that Fiano was in Las Vegas on March 28, 1958 was supplied by the defendant himself [R. 204-207], and by Major A. Riddell who testified not only that the defendant was in Las Vegas on March 28, 1958, but also as to the time and place he saw the defendant in Las Vegas on that date. [R. 238-239.] In addition Riddell testified that appellant gave him a "betting marker" in Las Vegas on the week-end of March 28, 1958. [R. 241, 246.] Another witness, Jeanne Haddad, testified that the defendant was not in Lucy's restaurant on March 28. [R. 179, 184, 185.]

Another glaring weakness, in appellant's allegation of error regarding the disqualification of witness Blackburn, is that no offer of proof was tendered by appellant regarding the evidence which Blackburn sought to introduce. Under such circumstances the question cannot properly be brought before an appellate court because

"in absence of an offer of proof, the ruling of the trial court is not reviewable."

Goldstein v. United States, 63 F. 2d 609 (8th Cir., 1933);

Cf. Hunt v. United States, 231 F. 2d 784, 787-788 (8th Cir., 1956);

MacDonald v. United States, 246 F. 2d 727 (10th Cir., 1957);

Elder v. United States, 202 F. 2d 465 (9th Cir., 1953).

It should also be noted that not only was no offer of proof made, but on the contrary, the exhibit was withdrawn by the appellant [R. 237.]

The question involved in the Court below was not qualifications of the records, but rather the competency and qualifications of the witness to introduce them. The de-

fendant, who had been to Las Vegas the week before the trial to procure such records [R. 227] obviously could not qualify as a proper custodian since he did not even work at the Tropicana Hotel. The Court's determination that Blackburn could not qualify as a proper custodian of the records in question was based upon the questions addressed to the witness, his hesitancy in answering the questions, and his general demeanor when he was testifying. Though Title 28, United States Code, Section 1732 does not outline the qualifications of proponents of business records, the case law indicates that a witness must have some special qualifications to introduce such records.

Turner v. United States, 202 F. 2d 523, 525 (9th Cir., 1953) (where "qualified officers" were proponents of the records);

United States v. Conquest, 148 Fed. Supp. 62, 64 (E. D. Pa., 1957) (witness was an officer of a corporation and the records were kept in his custody and control);

Jolley v. United States, 232 F. 2d 83 (5th Cir., 1956) (two witnesses who introduced business records had custody of such records).

Appellee submits that even though a proponent of business records is not technically an expert witness, he is at least analogous to an expert witness in that he should have qualifications an ordinary witness does not have. Thus, he must be able to testify to such procedures in preparing business records as to show that the records were made in the ordinary course of business and that it is part of the ordinary course of business to make such records (28 U. S. C. Sec. 1732). It would seem that the proper person to give such testimony is a so-called "custodian," a person under whose custody and control such records are kept.

The qualifications of such “quasi-experts” or “skilled” witnesses, it is submitted, is a matter to be determined by the trial judge in his discretion.

See:

Henderson v. United States, 218 F. 2d 14, 17 (6th Cir., 1955);

Troutman v. United States, 100 F. 2d 628, 633 (10th Cir., 1939).

Appellant argued in his brief that the “rejection of this exhibit had more than passing consequences” because Giorgio paid the defendant the money on March 28, 1958. However, Agent Giorgio did not testify that he paid Fiano \$7,500 on March 28, 1958, as appellant misstates on pages 3 and 20 of his brief. April 2, 1958 was the date on which Giorgio gave Fiano \$7,500 for the narcotics and April 7, 1958 was the date on which the narcotics were placed in Giorgio’s car. [R. 73, 80-81.] When the evidence is thus viewed correctly the significance which appellant attaches to this evidence diminishes appreciably.

In any event it would seem that it is not even necessary for the Court to reach the merits of appellant’s contention on this issue, in view of the admission of other evidence covering the same facts and appellant’s failure to make an offer of proof regarding the proffered hotel records.

B. The Trial Court Did Not Err in the Admission of Evidence During the Course of the Trial.

It is almost too elementary for the citation of authority that an objection to an allegedly improper question is necessary to preserve any claimed error on appeal.

Alvarado v. United States, 9 F. 2d 385, 386 (9th Cir., 1925);

Olender v. United States, 210 F. 2d 795, 800 (9th Cir., 1954).

All of the testimony of which appellant now complains went into the record without objection. Apparently appellant saw nothing harmful in such evidence at the time of trial. He cannot now complain, when he gave the trial court no opportunity to rule on the admissibility of those matters he now claims prejudiced his cause. As was succinctly stated by the Court in *United States v. De Marie*, 226 F. 2d 783, 788 (7th Cir., 1955):

“ . . . in absence of a valid objection made at the proper time, a party may not on appeal claim that the introduction of such evidence was error.”

Cf. Anthony v. United States, 256 F. 2d 50 (9th Cir., 1958).

This rule is especially true of hearsay evidence, which the appellant has singled out as chief object of attack in his discussion concerning the admission of certain testimony. In *United States v. Costello*, 221 F. 2d 668, 678 (2d Cir., 1954), the Court in a general discussion of hearsay evidence said that

“ . . . decisions . . . have again and again held that it may be as dependable a reliance at a trial as any other evidence; the only condition upon its use being that the opposite party shall not object to it.”

And when hearsay is admitted without objection,

“ . . . it is to be considered, and accorded its natural probative effect, as if it were in law admissible.”

Spiller v. Atchison, Topeka and Santa Fe Railway Company, 253 U. S. 117, 130;

Cf. Diaz v. United States, 223 U. S. 442;

Rosenberg v. United States, 195 F. 2d 583, 596 (2d Cir., 1952).

In addition it might be noted that on page 22 of appellant's brief wherein he cites a number of pages in the transcript alleged to contain hearsay testimony, a careful reading of most of those pages fails to reveal any hearsay recorded thereon. In fact his citation of error regarding the admission of hearsay on page 128 of the transcript is somewhat odd, since the questions reported therein were asked by his own attorney and did not elicit any hearsay statements from witness Garberson.

Since the matters of which appellant complained were more fully set out under the section of his brief dealing with prosecutor's misconduct appellee will discuss such matters more fully under that heading.

C. There Is No Merit to Appellant's Contention That He Was Denied a Fair Trial by the Participation of the Trial Judge in Questioning Witnesses.

During the course of the trial the judge asked questions of the witnesses of both the plaintiff and the defendant. In doing so, he carried out one of his duties in seeing that the jury was fully informed as to all the relevant facts in the case. The Court in *Batsell v. United States*, 217 F. 2d 257 (8th Cir., 1954) expressed the trial judge's function in this regard in the following language:

“ . . . In the trial of any case, the judge has the responsibility of seeing that justice shall prevail and to that end may question the witnesses and may even express his opinion with reference to their testimony, provided, of course, that he makes it clear to the jury

that they are the ultimate determiners of the facts in question.”

Cf. Callahan v. United States, 35 F. 2d 633 (10th Cir., 1929);

Goldstein v. United States, 63 F. 2d 609 (8th Cir., 1933);

Glasser v. United States, 315 U. S. 60, 82.

In the instant case, the Court not only brought out facts favorable to the accused [R. 196, 198, 81], but also protected appellant by objecting to the admission of testimony concerning the defendant's statements made to officers after his arrest. [R. 127.] To guard against the possibility that the jury *might* have thought he held an opinion, the trial judge instructed that:

“Any opinion of the judge as to the guilt or innocence of this defendant, if directly or indirectly expressed in these instructions or otherwise during the trial, you are at liberty to disregard, and it is not binding upon you, for, as stated in the beginning of these instructions, to the jury exclusively belongs the duty of determining the facts, but the law you must accept from the court, as correctly given to you in these instructions.” [R. 316-317.]

D. The Court Did Not Deprive Appellant of “A Full and Fair Trial and Due Process of Law” by Instructing One of the Jurors Not to Take Notes.

Appellant's failure to cite authority for the position he has taken regarding the judge's instruction to one juror not to take notes is somewhat indicative of the lack of merit inherent in this contention. With the reporter on hand to read testimony back to the jury, should a question regarding proceedings at the trial arise during the jury's deliberations, it is difficult to imagine how or in what way

the appellant was prejudiced by the judge's remark. If anything the judge's action was wise, since it is not difficult to conceive of a situation where one juror might incorrectly record testimony and during deliberations impress his or her interpretation of the facts on the other jurors by virtue of the argument that he or she had recorded certain testimony contemporaneously.

"The trial judge has the duty to supervise, direct, and control the proceedings in his court and his rulings will not be reversed in the absence of a clear abuse of discretion."

Brennan v. United States, 240 F. 2d 253, 262 (8th Cir., 1957).

E. There Was No Prejudicial Misconduct on the Part of the Prosecutor During the Course of Trial or Argument.

Initially, one of the great weaknesses in appellant's present position before this Court is that he himself did not think any of the questions or remarks of the prosecutor were improper at the time of trial, since he did not tender any objections to such questions or remarks when they were made. It is, of course, rather basic law that in order to preserve any alleged errors on appeal regarding the admission of evidence an objection to such evidence is essential.

Pratt v. United States, 225 F. 2d 23 (D. C. Cir., 1955);

Self v. United States, 249 F. 2d 32 (5th Cir., 1957);

Canton v. United States, 226 F. 2d 313 (8th Cir., 1955);

Olender v. United States, 237 F. 2d 859 (9th Cir., 1956).

The immediately preceding sentence may appear to be a mere restatement of the argument made with regard to the trial court's alleged errors in the admission of evidence and, in reality, they are part of the same seamless web, but appellant has dealt with the same errors more fully under this heading and therefore appellee will do the same for the Court's convenience.

Upon examination of appellant's charges of misconduct, it would appear that most of his allegations are more shadow than substance. For example, on lines 19 to 22 on page 31 of his brief, appellant states that the prosecutor asked a "question concerning one Frank Sica." [R. 85.] This allegation is incorrect in that it incorporates the answer into the question. The question was a general one which merely asked:

Q. Did you have a further conversation with him then?

In reply Agent Giorgio stated:

A. I did ask him rather casually to introduce me to Frank Sica. [R. 85.]

Needless to say the question did not concern Frank Sica. If the testimony was objectionable appellant should have made a motion to strike.

Appellant also appears to have made a slight misstatement when he alleges that "counsel for the government *asked for* and received hearsay evidence." (App. Br., p. 31, lines 13-14.)* In some instances the testimony now complained of consisted of defendant's conversations with the agent during the course of their negotiations regarding narcotics. [R. 73.] But most of the pages cited reveal not

*The abbreviation "App. Br." refers to the Appellant's Brief.

only that the prosecutor did not *ask* for hearsay evidence, but that there is no hearsay testimony recorded on those pages. [R. 82-83, 109-110, 112, 120-122, 145-146.] In any event, and at the risk of appearing repititious, it should once again be noted that there were no objections to the testimony recorded on the pages cited in appellant's brief, and therefore no error can now successfully be assigned to the admission of such testimony. A rule of evidence not invoked is waived. This is especially true of hearsay evidence.

United States v. Costello, 221 F. 2d 668, 678 (2d Cir., 1954);

Byars v. United States, 238 F. 2d 83, 84 (6th Cir., 1956);

Rosenberg v. United States, 195 F. 2d 583, 596 (2d Cir., 1952).

The questions about appellant's trip to Las Vegas the week before the trial were proper since they were inquiries into appellant's efforts to produce the witnesses who testified he was in Las Vegas on March 28, 1958 [R. 239-240]; and were also further inquiries into appellant's testimony which sought to establish his presence in Las Vegas on March 28, 1958, which he undoubtedly expected would be corroborated by certain hotel records and by the testimony of witnesses Haddad, who testified he was not in Los Angeles [R. 179], and Riddell who testified he was *in* Las Vegas on that date. The questions regarding his encounter and conversations with Las Vegas Police were part of the same general inquiry, and if there was any error in the wording of the question, the defendant's answer fully cured it and rendered the entire incident innocuous. [R. 226-227.]

Sistrunk v. United States, 162 F. 2d 188 (5th Cir., 1947);

Garber v. United States, 145 F. 2d 966 (6th Cir., 1944);

Todorow v. United States, 173 F. 2d 439, 448 (9th Cir., 1949);

Brennan v. United States, 240 F. 2d 253, 262 (2d Cir., 1957);

Alberty v. United States, 91 F. 2d 461, 463-464 (9th Cir., 1937);

United States v. Bando, 244 F. 2d 833, 846 (2d Cir., 1957).

In *Watson v. United States*, 234 F. 2d 42, 45 (D. C. Cir., 1956) (reversed on other grounds) the Court uttered the following words, which might well apply to the question here alleged as error:

“ . . . The question and answer here, however, seem to have been part of a rapid-fire series designed to demonstrate the falsity of appellant's testimony and thus to impeach his veracity, and not to have been intended to link appellant with another charge . . . ”

The Court need not even reach the merits of appellant's contention, however, since no objection was interposed to the questions.

Reavis v. United States, 106 F. 2d 982, 984 (10th Cir., 1939);

Brennan v. United States, *supra*;

Sistrunk v. United States, *supra*.

The questions about money taken from defendant at the time of his arrest [R. 228-229] were only further inquiries about matters to which the defendant had already testified on direct examination. [R. 218.]

The questions about defendant's other name [R. 221, 229] were necessarily preparatory to asking him if he had ever been convicted of a felony, in view of the fact that

he was convicted under the name of Louis Friedman and not Louis Fiano.

Appellant also belatedly alleges misconduct by the prosecutor in his arguments to the jury, even though he apparently saw nothing improper at the time such remarks were made, inasmuch as he failed to voice any objections. It is almost a household saying in the Federal Courts that an objection is necessary to preserve alleged error when defendant thinks prejudicial argument is being made, and the Appellate Court will not notice for the first time on appeal alleged errors which could not have seriously prejudiced the rights of appellant.

Gage v. United States, 167 F. 2d 122, 125 (9th Cir., 1948);

Heald v. United States, 175 F. 2d 878 (10th Cir., 1949);

Mitchell v. United States, 208 F. 2d 854, 857 (8th Cir., 1954);

Padron v. United States, 254 F. 2d 574 (5th Cir., 1958);

De Bonis v. United States, 54 F. 2d 3 (6th Cir., 1931).

In *Alberty v. United States*, 91 F. 2d 461, 463 (9th Cir., 1937), this Court stated this well-established rule thusly:

“ . . . Whatever hesitation counsel may have regarding a claim of misconduct of a trial judge, there should be none in claiming it against the prosecutor. It should be made at once. The court should be given the opportunity for instant correction and, if the offense be sufficiently hurtful, declare a mistrial. Counsel cannot occupy the instruments of justice, the court and jury, in an extended trial, and without objection or motion for relief, raise such questions on appeal.”

Perhaps the classic case dealing with this problem is *United States v. Socony-Vacuum Oil Company*, 310 U. S. 150, 237 in which Mr. Justice Douglas in holding that no prejudicial error occurred in the Government's arguments, declared that:

“ . . . counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial.” (P. 239.)

Nor should the *alleged* prejudicial remarks be viewed out of context, but rather the argument should be read as a whole. (*United States v. Socony-Vacuum Oil Company*, *supra*, at p. 342.)

Reading the arguments in the instant case in their entirety indicates that none of the remarks quoted in appellant's brief when viewed in their proper context prejudiced the defendant. Many of these remarks were inferences drawn from matters in the record. For example the statement that a person dealing in narcotics would not say over the telephone that he had narcotics to sell, but would more likely tell the purchaser he had someone to meet [R. 236] was proper when the defendant had made substantially the latter statement to Agent Giorgio over the telephone. [R. 74.] The statement that Mr. Giorgio was a bit shaky and raced into the parking lot and parked at an odd angle [R. 266] was proper since Giorgio had testified that he drove in rather hurriedly because he was late and as a consequence parked hurriedly in an odd position across the white lines. [R. 75-76, 111.] The comment on the cost of narcotics [R. 271] was proper in view of the testimony of Giorgio that he gave Fiano \$7,500 for only 17 ounces. [R. 73, 44.] As a matter of fact appellant's counsel also

made the point that this was a huge amount of heroin. [R. 284.]

In like vein, the entire discussion regarding the identity of the person or persons who placed the narcotics in the car contained inferences drawn from the testimony adduced at the trial. [R. 272-274; 75, 77-80.] The closely allied discussions on possession were properly based upon the instructions to be given by the Court. [R. 272.] These instructions were shown to both counsel before argument [R. 164] and later were orally given to the jury. [R. 314.]

The prosecutor's comment that without a sale there "undoubtedly would have been no prosecution," is a sentence taken out of the context of a paragraph which was in answer to appellant's contention that no stealth was shown by Fiano in dealing with Giorgio. [R. 281-284.] In answer to appellant's argument it was in turn argued that stealth could be shown by framing the sale as a point of reference rather than the numerous conversations preceding the sale. [R. 303.] Similarly the comment on why agent Giorgio was willing to wait for the narcotics, was in answer to appellant's argument that it was improbable anyone would wait. [R. 290.] Such so-called retaliatory remarks are proper.

Baker v. United States, 115 F. 2d 533 (8th Cir., 1941) *cert. den.*, 312 U. S. 692;

Ochoa v. United States, 167 F. 2d 341 (9th Cir., 1948);

United States v. Achilli, 234 F. 2d 797 (7th Cir., 1956) *cert. den.*, 352 U. S. 1023, *affd.* 353 U. S. 373;

See *Lawn v. United States*, 355 U. S. 339, 359 (footnote).

The reference to the fact that someone was lying only sought to raise an issue of veracity between the government agents and defense witnesses and is therefore permissible comment.

United States v. Marino, 141 F. 2d 771, 774 (2d Cir., 1944). And counsel for appellant agreed that the credibility of witnesses was completely at issue regarding March 28, 1958. [R. 287.]

“Counsel have a right to make any argument based upon evidence proven in the case, or which may be reasonably inferred therefrom, or to make reply to that made by opposing counsel . . . Defendants trial counsel evidently did not regard the argument as vicious or unfair as objection was made to one statement only. . . .”

United States v. Doyle, 234 F. 2d 788, 796 (7th Cir., 1956);

Cf. United States v. Achilli, 234 F. 2d 797, 802 (7th Cir., 1956);

Baker v. United States, 115 F. 2d 533 (5th Cir., 1941), *cert. den.* 312 U. S. 692.

If there is error in any of the comments or questions of the prosecutor, which appellee does not concede, it is not so serious as to be prejudicial in the context of all the evidence in the case. Such evidence was clear and convincing. In such circumstances alleged minor errors should not be noticed as grounds for reversal under Rule 52(b), Federal Rules of Criminal Procedure.

Langford v. United States, 178 F. 2d 48, 54 (9th Cir., 1949);

Gage v. United States, *supra*, at 125.

See also:

Lawn v. United States, *supra*.

F. The Defendant Was Not Prejudiced by the Judge's Refusal to Grant a Continuance of the Trial Date in the Court Below.

After appellant's arraignment on May 19, 1958, he had almost two months to prepare for his trial, which began on July 15, 1958. The charge was contained in a single count indictment and was stated in rather clear terms. The only question presented was whether or not the defendant committed the acts charged. Under such circumstances it was not an abuse of discretion to deny a continuance and proceed with the trial as scheduled.

"The granting of a continuance is not a matter of right, but is always within the sound discretion of the Court. Nor will the Court's exercise of its discretion be disturbed unless it is abused to the prejudice of the complaining party."

Williams v. United States, 203 F. 2d 85, 86 (9th Cir., 1953);

Cf. Sherman v. United States, 241 F. 2d 329, 338; *United States v. Marsek*, 249 F. 2d 941, 943 (7th Cir., 1957);

United States v. Yager, 220 F. 2d 795, 796 (7th Cir., 1955).

It is submitted that in view of the amount of time which elapsed between the appellant's arraignment and the trial date, the Court did not abuse its discretion, if the Court's action is to be equated with an actual denial of appellant's motion. The motion, however, was ordered off calendar because the defendant was not present. Since the defendant was entitled to a speedy trial, the Court was correct in ordering the matter off calendar when the defendant was not present to voice his opinion on the continuance. If

the Court had continued the trial, appellant would now probably assign the Court's action as error because he was not present and was denied a speedy trial.

G. The Trial Court Gave Proper and Adequate Instructions on the Law to the Jury. If the Court Did Err the Appellant Cannot Now Complain Because Appellant Did Not Object to the Instructions as Given, Nor Did He Request Any Instructions.

One of the most basic of rules in the Federal Courts is that whenever any specific instruction is desired by a defendant, such defendant must request that the desired instruction be given by the Court in its charge to the jury. It follows that an assignment of error may not be predicated upon the judge's failure to give such an instruction when the defendant fails to request it.

Goldsby v. United States, 160 U. S. 70, 77;

Himmelfarb v. United States, 175 F. 2d 924, 944 (9th Cir., 1948), *cert. den.*, 338 U. S. 860;

Obery v. United States, 217 F. 2d 860 (D. C. Cir., 1954).

This Court, in addressing itself to a similar contention, proclaimed emphatically that:

“ . . . under Rule 30 . . . in order to have considered an assignment of error in the failure to give a specific instruction, a request that it be given must first be made to the Court.”

Zamloch v. United States, 193 F. 2d 889 (9th Cir., 1952);

Cf. Bryson v. United States, 238 F. 2d 657, 664 (9th Cir., 1956);

Pitts v. United States, 237 F. 2d 217 (D. C. Cir., 1956).

In the instant case not only were no instructions requested by the appellant but also, no objections were made to the instructions as given. Rule 30, Federal Rules of Criminal Procedure, Title 18 has provided that:

“ . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.”

After the Court below had handed counsel for appellant the instructions to be given [R. 164] appellant was specifically asked by the Court on two occasions [R. 230 and 317] if there were any objections and on both occasions counsel stated clearly that there were none. This Court, in considering similar circumstances in *Enriques v. United States*, 188 F. 2d 313, 316 (9th Cir., 1951), said that:

“ . . . Rule 30 is not designed as a mere trap for the unwary. Painsstaking compliance with its requirements, although not an easy matter for the lawyer, is of the very essence of the orderly administration of justice.”

Another Court stated the salutary purpose of Rule 30 thusly:

“ . . . The obvious purpose of this rule is to afford the judge an opportunity to correct erroneous instructions before the jury retires to consider its verdict. . . . ”

Palmer v. United States, 220 F. 2d 861, 867 (10th Cir., 1955).

Needless to say the Court below was not afforded such an opportunity.

Appellant's brief, however, is not devoted merely to negative comments; he offers therein constructive sugges-

tions at this stage of the proceedings as to what the trial judge *should* have included in the charge to the jury. Appellant contends that the omission of such instructions constitutes plain error which should be recognized by this Court under Rule 52(b), Federal Rules of Criminal Procedure. In this he would appear to be wrong for at least two reasons: First, that the instructions he argues should have been given do not apply to the instant case; and secondly, that such instructions as now requested by appellant would have been patently incorrect, even if they could have had some application to the instant case.

For example, appellant contends that the trial judge should have instructed “. . . the jury as to (the) requirement that circumstances be consistent only with theory of guilt and inconsistent with any hypothesis of innocence.” (App. Br. pp. 39 and 40.) The United States Supreme Court disagrees. In *Holland v. United States*, 348 U. S. 121, 139, in which the Court reviewed a net-worth income tax evasion case, Mr. Justice Clark, in considering the trial court’s *refusal* to give the instruction mentioned in appellant’s brief, said:

“The petitioners assail the *refusal* of the trial judge to instruct that where the Government’s evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions . . . but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. *United States v. Austin-Bagley Corporation*, 31 F. 2d 229, 234, *cert. den.* 219 U. S. 863; *United States v. Becker*, 62 F. 2d 1007, 1010; Wigmore, Evidence (3rd Ed.), §§25-26.”

Cf. *United States v. Allard*, 240 F. 2d 841 (3d Cir., 1957).

Appellant also argues that the Trial Court should have instructed more fully on inferences and presumptions, to wit, that the jury should have been instructed "as to the impropriety of basing an inference on an inference or a presumption on a presumption." (App. Br. p. 41.) This Court has considered this pressing issue, and speaking through District Judge James Carter has considered that:

" . . . The old rule laid out in *United States v. Ross* (1875), 92 U. S. 281, 283, that an inference predicated upon an inference is inadmissible has been repudiated . . . (citing cases) . . . The acceptability of the inference drawn turns on whether it has been founded upon 'fact' regardless of whether such fact has been arrived at by direct or circumstantial evidence. . . ."

Toliver v. United States, 224 F. 2d 742, 745 (9th Cir., 1955).

It would also appear that such an instruction would be extremely confusing to any jury and would, perhaps, harm rather than help the cause of justice. In addition, the rule as stated by appellant would appear to be more suited to application by judges when ruling upon the admissibility of evidence, when acting upon motion for judgment of acquittal, or when reviewing cases on appeal. A reading of cases cited by appellant for this outmoded proposition reveals circumstances where the facts upon which inferences were to be drawn were themselves established by inference. This appears to have been just another mode of saying that the evidence was insufficient as a matter of law or that certain evidence was inadmissible because of remoteness.

Even if such a rule were still extant, it is inconceivable that it could be applied to the instant case. Here no

inferences are really necessary to prove the crime charged in the indictment—sale and facilitation of sale of narcotic drugs. The defendant had a number of conversations with Agent Giorgio relating to the purchase and sale of narcotics. [R. 52, 54, 56-60, 70.] On April 2, 1958 Agent Giorgio received \$7,500 in official advance funds which at the defendant's request he transferred to the defendant. [R. 73.] On April 7, 1958 Fiano telephoned Giorgio and told the agent to meet him at Lucy's. Giorgio drove down to Lucy's, was greeted by Fiano who took the agent inside the restaurant. [R. 76.] Appellant then told Giorgio that "his (Fiano's) people" were going to take Giorgio's car for a little while and that the "stuff" would be under the front seat on the driver's side. [R. 77-78.] Fiano then left Giorgio for about fifteen minutes and when he returned informed the agent that Fiano's people had returned the car and that the narcotics would be under the front seat on the driver's side. [R. 79.] Giorgio found the narcotics in the exact place designated by defendant. [R. 80.]

The facts related above might invite speculation as to who placed the narcotics in the car, and one could infer it was the defendant or one could infer it was "his people." But neither inference is necessary to establish the offense charged. The taking of the money, the information the defendant imparted to Giorgio as to the location of the narcotics and the finding of narcotics at that location by Giorgio are enough to find that the defendant made a sale of narcotics, or that he facilitated such a sale.

The preceding skeletal outline of evidence also suggests the possibility that appellant is proceeding on the false assumption that this is "a circumstantial evidence case," so-called. It is at least arguable that the offense was established by direct evidence, to wit: the testimony of

agent Giorgio and his brother officers as to defendant's conversations and actions *and* the finding of the heroin at the exact place defendant said it would be located.

This outline of evidence also unmasks appellant's contention that he had neither actual nor constructive possession of the subject heroin. It clearly shows that Fiano had control over the movement or placement of the narcotic, assuming he never actually held it in his hands.

"A person who, although not in actual possession, knowingly has the power at a given time to exercise dominion or control over a thing, is then in constructive possession of it."

Mathes, *Some Suggested Forms For Use in Criminal Cases*, 20 F. R. D. 267, 278.

The facts of the instant case as applied to this definition illustrate a rather typical example of constructive possession.

Appellant also complains that "(n)o instruction was given here as to appellant's alibi theory of defense." (App. Br. p. 39.) A reading of the record fails to reveal that the appellant ever put on such a defense. The word alibi has been variously defined as follows:

Black's Law Dictionary (4th Ed.):

"ALIBI *Lat.* In criminal law, elsewhere; in another place. . . ."

Webster's New International Dictionary (2d Ed.):

". . . 1. *Law.* The plea of having been, at the alleged time of the commission of the act elsewhere than at the alleged place of commission; also, the fact or state of having been so elsewhere. 2. A plausible excuse; also, any excuse. *Colloq.*"

One of the standard jury instructions used in the Federal Courts charges thusly:

“Evidence has been introduced tending to establish what we call an alibi—that the defendant was not present at the time when and the place where he is alleged to have committed the offense charged in the indictment. . . .”

Hon. William C. Mathes, *Some Suggested Forms For Use In Criminal Cases*, 20 F. R. D. 231, 256; *Cf. Colbeck v. United States*, 10 F. 2d 401, 403 (7th Cir., 1925);

Tomlinson v. United States, 93 F. 2d 652, 655 (D. C. Cir., 1937).

In the trial of this case in the Court below, the defendant not only did not deny that he was present at the time and place where the alleged offense occurred, but on the contrary, testified that he was present at such times and places, though he denied any acts consistent with the commission of the instant offense. Thus, after Agent Giorgio had testified that he received a call from the appellant on April 2, 1958 at approximately 12:30 p.m. [R. 70], and then met Fiano at Lucy's Restaurant where he gave Fiano \$7,500 for the narcotics [R. 70-73], the defendant testified that he saw Agent Giorgio at Lucy's on April 2, 1958 at 2:00 p.m., but did not receive any money from the agent. [R. 207-209.] The appellant never claimed to be at any other place when the money was exchanged, nor did he produce any witness to testify to that effect. On the date on which the indictment alleges that the sale of heroin occurred, April 7, 1958, the prosecution and the defense were in rapt agreement. Agent Giorgio testified that on April 7, 1958 he received a call from Fiano about 9:50 a.m. and immediately drove to

Lucy's where he met the defendant at approximately 10:30 a.m. [R. 74-79.] When the defendant took the witness stand he testified that he had a conversation with Agent Giorgio at Lucy's in the forenoon on April 7, 1958 [R. 154-155]. In response to Agent Jones' testimony which placed Fiano in the parking lot at Lucy's on the morning of April 7, 1958 [R. 154-155], the defendant offered the explanation that he was in the parking lot at Lucy's in the morning fixing some water cooler pumps and looking for a person he called his "colored boy." [R. 212.] It was on this date that the narcotics were placed in Giorgio's car while it was parked in Lucy's lot. [R. 80, 154.]

An alibi instruction would therefore have been improper.

Assuming, *arguendo*, that an alibi was established, the defendant should have requested such an instruction and may not now assign error in the Court's failure to do so on its own motion because:

“. . . except in cases where the sensitive defense of insanity is involved . . . (*Tatum v. United States*, 190 F. 2d 612) . . . , or where the trial situation has been one of such complexity or confusion as to persuade of probability that, without some statement by the Court, the jury will not be able intelligently to comprehend or keep in mind the significant evidential questions involved . . . , the defendant in a criminal case will not ordinarily be heard to complain of the trial court's failure to set out in its charge his specific theory or theories of defense, unless he has himself formulated them into a proper and tendered instruction.”

Apel v. United States, 247 F. 2d 277, 282 (10th Cir., 1957).

In addition the California courts have held that alibi is not a general principle of law and therefore the court

need not give such instruction on its own motion even though substantial evidence thereon is in the record.

People v. Whitson, 154 P. 2d 867 (Cal., 1945),
cert. den. 325 U. S. 874;

Cf. People v. Williams, 314 P. 2d 161, 164.

H. The Evidence Presented by the Government Is Sufficient to Sustain Appellant's Conviction.

It is invariably held in the Federal Courts that upon appeal from a conviction, the evidence and all inferences which may reasonably be drawn therefrom are to be viewed in the light most favorable to the government.

United States v. Glasser, 315 U. S. 60, 80;

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), *cert. den.* 347 U. S. 937;

United States v. Brown, 236 F. 2d 403, 405 (2d Cir., 1956);

Arena v. United States, 226 F. 2d 227 (9th Cir., 1955), *cert. den.*, 350 U. S. 954.

Viewing the evidence in this light

“ . . . (t)he verdict of the jury must be sustained if there is substantial evidence. . . .”

Woodard Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952).

And the Court in the *Woodard* case defined substantial evidence as

“ . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” (*Supra*, at p. 998.)

With these rules in mind, a review of the record leads almost inescapably to the conclusion that there was sub-

stantial, and perhaps conclusive, evidence upon which the jury could have based a verdict of guilty. The appellant entered into a series of negotiations with Federal Narcotics Agent Stephen Giorgio, who the appellant knew as Louis Di Stephano, after meeting Giorgio at Lucy's Restaurant in mid-March of 1958. [R. 48.] At this time appellant Fiano knew the agent only as a customer at the restaurant. After Giorgio had visited the restaurant a number of times, he and Fiano had a conversation about the woman's wrist-watch on March 26, 1958, and it was at this time that Fiano and the agent first discussed narcotics. [R. 52.] After this initial conversation about narcotics, the defendant carefully checked Giorgio's background before he accepted \$7,500 for the purchase of 17 ounces of heroin. [R. 56, 57, 62, 63, 66 and 73.] On the morning of April 7, 1958 when the narcotics were placed in Giorgio's automobile, the defendant continued to be wary of dealing with Giorgio when he said,

“ . . . ‘Lou’ . . . ‘I still don't know you’
 . . . ‘but I am going through with this thing.’ ”

[R. 77];

and when he was perhaps testing the agent's knowledge of the narcotics trade in the following colloquy related by Agent Giorgio:

“He wanted to know with what I cut the narcotics. . . .

“He asked me was I going to sell it pure or cut it, so I said I would cut it. . . .” [R. 78.]

“He asked me what I was going to use, and I told him quinine, milk sugar, mannite. He threw his hands in the air and said, ‘Naw, Naw! Just use milk sugar.’ . . .” [R. 79.]

Prior to the time that Giorgio found the heroin in his automobile on April 7, 1958, appellant told the agent that "his (Fiano's) people" were going to take Giorgio's car, which was parked at Lucy's Restaurant [R. 77] and further informed the officer that "the stuff will be under the front seat on the driver's side." [R. 78.] Fiano then left the agent for approximately fifteen minutes [R. 78] during which time he was observed by Agent Jones to emerge from the restaurant and enter Lucy's parking lot [R. 154] and approach the area in which Giorgio's car was parked [R. 163], after which he looked over the surrounding area very carefully and then reentered the restaurant. [R. 154.] After entering the restaurant Fiano engaged in the conversation about cutting heroin (*supra*), and then told Giorgio that Fiano's people had brought the agent's car back and that the narcotics would be under the front seat on the driver's side. [R. 79.] Agent Giorgio walked out of the restaurant with Fiano and then drove off alone [R. 80], while the defendant remained in the parking lot scanning the general area. [R. 155.] When Agent Giorgio reached his apartment he found a package under the seat of his car on the driver's side [R. 80] in the exact place the defendant said it would be. This is surely not a coincidence.

It is submitted that the proven facts related above present substantial evidence upon which a jury of reasonable persons could have based a verdict of guilty. The only question presented was one of credibility. The jury obviously chose to believe Agent Giorgio and his brother officers and to disbelieve the defendant and his witnesses. When questions of credibility are involved, appellate courts will not disturb the verdict of the jury, since it is not

the function of appellate courts to weigh evidence or determine credibility of witnesses.

Woodard Laboratories v. United States, supra;
Sandez v. United States, 239 F. 2d 239, 243 (9th Cir., 1956);
Penosi v. United States, 206 F. 2d 529 (9th Cir., 1952).

With regard to appellant's analysis of the number of inferences to be made, this appears to be unwarranted in light of appellant's statement to Giorgio that the narcotics would be under the front seat of the car, and in view of this circuits repudiation of the archaic doctrine that an inference cannot be based upon another inference.

See *Toliver v. United States*, 224 F. 2d 742, 745 (9th Cir., 1955).

See also discussion under *Point G, supra*.

This evidence would seem to raise very few doubts, but even if a few possible doubts remain,

“(t)he proof in a criminal case need not exclude all *possible* doubt. It ‘need go no further than reach that degree of probability where the general experience of men suggest that it has passed the mark of reasonable doubt.’”

Norwitt v. United States, 195 F. 2d 127, 134 (9th Cir., 1952), *cert. den.*, 344 U. S. 817.

Panci v. United States, 256 F. 2d 308 (5th Cir., 1958), upon which appellant relies so heavily is easily distinguishable on its facts. In that case, hearsay statements were admitted over objection to connect the defendant with a conspiracy when the conspiracy had not been established by independent evidence. There were no statements of the defendant which connected him with the conspiracy.

The evidence only showed that an agent had given \$1,050 to co-defendant Giardina. The latter went to his house and procured one ounce of heroin from a brown bag. Prior to this there was testimony that Panci and Giardina were seen together and Panci was seen giving a brown bag to Giardina. The bag was never identified as the one given by defendant to Giardina nor could anyone testify that the bag had narcotics in it when Panci gave it to Giardina. In the instant case the defendant told Agent Giorgio where the narcotics were to be retrieved; Agent Giorgio found them in the place indicated by appellant; and Agents Giorgio and Garberson testified to making a field test which showed that the substance Fiano sold to Giorgio was heroin. [R. 82-83, 121.] Needless to say the instant case was not a conspiracy and there was no hearsay introduced over objection tending to connect defendant with such conspiracy. In the instant case the statements of the defendant plainly indicated where the heroin was placed for delivery to the agent. There was no such evidence in *Panci*.

It is submitted that the evidence presented in the entire record is sufficient to support a verdict of guilt.

I. The Sentence Imposed Upon Appellant Was Not Excessive.

Appellant's argument that on a first offense the maximum is unwarranted seems to fly in the face of the statute under which appellant was sentenced since that statute makes a distinction between first and subsequent offenders and prescribes more substantial penalties for subsequent offenders.

21 U. S. C., Sec. 174.

The penalty imposed in this case was within the legal limits of the statute and is hardly excessive in view of the large amount of pure heroin involved. [R. 44-45.]

J. The Court Did Not Err in Denying Appellant's Motions for Judgment of Acquittal and a New Trial.

Prefatorily it should be pointed out that appellant may not now urge as error the Trial Court's denial of motions for judgment of acquittal and a new trial upon all of the grounds appellant alleges in his brief, since all of those grounds were not urged in the Court below in support of such motions. [R. 14-15.]

With regard to the sufficiency of the evidence, however, the evidence adduced by the prosecution (see *Point H, supra*) presented facts upon which the jury could have based a verdict of guilty.

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953).

When the evidence is in this state

“ . . . the case must be submitted to the jury, and their decision is final.”

Schino v. United States, supra.

The instant case, under the above test, was properly submitted to the jury.

The only other point legitimately preserved by appellant's motions made at the conclusion of the trial concerned the disqualification of defense witness Blackburn who sought to introduce an alleged hotel record. For the reasons stated in *Point A* of this brief, there was no reversible error committed by the Court in this regard.

V.

Conclusion.

From the rules and arguments set forth above, it is concluded that the trial court committed no error in the trial of the appellant. In the event that it is considered by this court that the trial court committed error, it is urged that the error was harmless.

Respectfully submitted,

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